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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 551

Case No. 575: MOHAPI

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Samar Sen; Mr. Hubert Thierry;

Whereas, on 16 March 1990, Margaret Mohapi, a staff member of the United Nations Development Programme, hereinafter referred to as UNDP, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended to 31 July 1990, the time-limit for the filing of an application to the Tribunal;

Whereas, on 12 July 1990, the Applicant, after making the necessary corrections, filed an application containing the following pleas:

"II. Pleas

I. I hereby plea to the Administrative Tribunal to revert the Secretary-General's decision of the following:

(a) Demoting me from level 5/IX to level 4/I effective 15 September 1988, as a disciplinary measure be rescinded because as had been recommended by the Specially Appointed Panel, the Panel felt that the penalty imposed was equally unjustified. The Panel disagreed with the Disciplinary Committee's finding that the loss of official funds was the result of negligence on both my part and the Lesotho Office. The Panel noted

that this specific finding of the Disciplinary Committee was not supported by the report of the Local Investigative Panel dated 11 May (...).

(b) With regard to the decision of the contested amount I find this decision is unjustified because it was the failure of my office to establish proper safeguards relating to financial transactions which led to the loss of official funds and not acts and/or ... my omission as I explained in my letter to the UNDP Resident Representative ... dated 26 May, 1987; ..."

Whereas the Respondent filed his answer on 30 April 1991;

Whereas the Applicant filed written observations on 23 October 1991;

Whereas the Applicant submitted an additional statement and further documentation on 21 May 1992;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNDP on 5 May 1975, at the local Office in Maseru, Lesotho. She served initially on a series of fixed-term appointments as a Financial Clerk at the G-4, step I level, until 1 January 1981, when she received a probationary appointment and 1 October 1981, a permanent appointment. On 1 January 1982, the Applicant was promoted to the G-5, step III level as Finance Assistant.

In discharging her functions as Finance Assistant, the Applicant was responsible for receiving payments from staff of the United Nations common system who rented housing provided by the Organization. Staff paid rent directly to the Applicant, who, upon receipt of the cash, provided the staff member with a temporary receipt. The amount paid was subsequently entered in a cash book by the Applicant or by another staff member of the office, and then a permanent receipt was issued to the payor. The cash was subsequently deposited in the Bank. The Applicant was not the only staff member performing these functions. Other staff of the office were involved in the different stages of the transaction. Also, cash was apparently deposited in the Bank by an office driver, sometimes on the day following the day on which payment of the rent had been effected.

On 9 April 1987, the UNDP Resident Representative asked the Applicant to provide an explanation in writing for a shortage of 219 maloti (approximately US$80) corresponding to a rental payment she had received on

27 October 1986, and for which she had issued a temporary receipt. The amount had not been recorded in the Office cash book nor deposited in the UNDP bank account.

On 16 April 1987, the UNDP Resident Representative asked the National Programme Officer and the United Nations Volunteer Programme Assistant to conduct an investigation concerning "several instances of loss of cash and supporting documentation for cash receipts in the Finance Section". On 21 April 1987, the Resident Representative informed the Applicant that a senior staff member from Headquarters would be arriving shortly to investigate "certain irregularities concerning house rents", which could not be accounted for and for which she was being held responsible. He had accordingly appointed a Panel to investigate the matter and "to determine the final responsibility". In the meantime, he suspended the Applicant from her duties with effect from Tuesday 21st April 1987, on full pay. He concluded by underlining that the suspension was "a temporary administrative measure, taken without prejudice to [her] rights as a staff member and which in no way implie[d] any accusation except professional negligence, against [her]."

In a report dated 11 May 1987, the members of the Panel submitted to the Resident Representative their findings and recommendations on the investigation. They read as follows:

"- In October 1986, Mr. Kolomytsev [a technical assistance expert] of WHO [World Health Organization] was issued with temporary receipt #21 on 27 October 1986, for October's rent. The temporary receipt was signed by [the Applicant].

- There is no record of a permanent receipt being issued for the money or the money being deposited in the bank during the months of October or November.

- Five counterfoils numbered between 36 - 40 have been removed from the temporary receipt book. The dates of the missing receipts were issued between 17 December 1986 - 12 January 1987.

- [The Applicant] informed the office that Dr. Ward-Brew [a WHO technical assistance expert] should be contacted for the identification of one of the missing receipts.

- A temporary receipt was issued to Dr. Ward-Brew for January's rent. However, there is no record of this amount in the Cash Book. Also there is no record that a permanent receipt was issued.

- This receipt was signed by [the Applicant].

- From our investigations four of the five missing counterfoils have been identified:

  1) ...
  2) ...
  3) ...
  4) ...

  The remaining missing receipt may belong to Dr. Kolomytsev since there is a record that a permanent receipt was issued however, there is no record that temporary receipt was issued.

- All of the missing counterfoils which were identified were signed by [the Applicant].

- [The Applicant] as well as other members of the Finance Section were queried and asked to provide a plausible explanation of what happened to the missing money and receipts. According to all members of the Finance Section, no explanation could be given.

Recommendations

Since two transactions have been identified in which money was missing between the months of October 1986 - January 1987, a more comprehensive investigation should be conducted to clarify the extent of the situation.

In the future only one person should be responsible in issuing temporary cash receipts. Also a circular should be sent out to all U.N. personnel informing them that they should always pick-up a receipt in the future whenever they pay in cash.

The temporary cash receipt book should balance out every month."

On 19 May 1987, the UNDP Resident Representative transmitted the report of the investigation panel to the Applicant and asked her to provide her comments thereon, in accordance with Chapter 20902.5 of the UNDP Personnel Manual. He added that the Panel's findings "led to evidence of misconduct and gross negligence on [the Applicant's] part, entailing a financial loss for the Organization." She would accordingly remain suspended from her duties until a decision was taken by Headquarters on her contractual status.

In a letter dated 26 May 1987, the Applicant submitted her comments on the report to the Resident Representative. She challenged the Resident Representative's assertion, in his letter of transmittal, to the effect that she had "no substantial statement to make" during their first interview on the case. She claimed that, on the contrary, she made statements during the several meetings she had with the Resident Representive and with his Deputy "repeatedly and jointly" and that her present letter was a repetition of their substance in writing. The Applicant admitted that she had received the missing amounts of money. She stated that although according to the Finance Manual, all monies received on a certain day must be deposited in the Bank on the same day, this rule was never followed in the office because banks in Lesotho were only open until 1:00 p.m. on weekdays and until 11:00 a.m. on Saturdays. Any cash payments received in the afternoon could only be deposited on the following day during banking hours. It was not herself, but the office driver who effected the deposits in the Bank. He was not available on a daily basis. Consequently, money would remain undeposited for days at a time in a filing cabinet in the Finance Section. All staff of the Section had access to the cabinet. The Applicant further argued that when asked by her supervisors to account for the missing cash, she discovered that other rent payments had not been deposited even though received and entered into the cash book and that a page of receipt stubs was missing from the temporary receipt book. The Applicant also claimed that she "brought all these [irregularities] to the attention of the Deputy". She states that he replied "we did not ask you to get more mistakes, but what you do is to get more mistakes and not tell us what you did with the money." She contended that both her supervisors should have thoroughly investigated the matter before bringing it to the attention of the Resident Representative.

On 28 May 1987, the Resident Representative ad interim recommended to Headquarters that the Applicant's appointment be terminated since she was responsible for the disappearance of the missing funds and was unable to account for them. In a confidential letter dated 24 August 1987, addressed to the Director, Division of Personnel, the Resident Representative fully endorsed the recommendation. He stated that it would not be possible for him to retain the Applicant's services in the Finance Section "in view of her misconduct and the financial loss incurred due to her gross negligence." He further alleged that the Applicant "was offering personal loans from the cash

box to those who wanted", which "made her popular amongst junior staff". He then attached a copy of a note from the senior Finance Assistant, which was critical of the Applicant's performance and in which he recommended that "should Headquarters decide to reinstate her, [the] Applicant ... should be assigned to other sections." Neither of these communications were shown to the Applicant.

The case was then examined by the UNDP/UNFPA Disciplinary Committee which, in its report dated 27 June 1988, found that:

> "... although the [Applicant] was guilty of gross negligence, she could not be accused of fraud. It was furthermore felt by the Committee that [the Applicant] was not qualified for the post she was occupying. General lack of safeguards relating to financial transactions in the field office was also pointed at and specifically that UNDP's financial rules and regulations were not being adhered to and that no such thing as a 'temporary receipt' existed"
>
> and recommended
>
> "that the [Applicant] be removed from the Finance Section and assigned to a post with lesser responsibilities."

In a cable dated 15 September 1988, UNDP Headquarters informed the UNDP Resident Representative that officials at Headquarters had decided to demote the Applicant from level 5 to level 4 as a disciplinary measure under staff rule 110.3(b) "STEMMING FROM PREPONDERANCE [OF] CIRCUMSTANTIAL EVIDENCE OF MISAPPROPRIATION [OF] OFFICIAL FUNDS ENTRUSTED TO HER", to reassign the Applicant to duties outside the Finance Section and to recover all missing funds (465 maloti, i.e., approximately US$170) from her. The period during which the Applicant was suspended should be converted to special leave with full pay. The Applicant was informed of this decision on 21 October 1988.

On 15 November 1987, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 18 October 1989. Its conclusions and recommendations read as follows:

"Conclusions and recommendations

56. The Panel concludes that:

- the appellant was not advised of her right to obtain the services of counsel to help her in the preparation of her defense;

- contrary to UNDP procedures, there was no record of written statements signed by the appellant and staff members interviewed by the Investigative Panel;

- there was an unreasonable delay in deciding the case of the appellant by the Administration;

- allegations of unauthorized lending of official funds by the appellant and of her rudeness and arrogance were never brought to the attention of the appellant so as to offer her an opportunity to rebut them and, accordingly, all documents containing such allegations constitute incomplete documents (see UNAT Judgement No. 138, Peynado);

- the appellant was not guilty of negligence;

- the reassignment of the appellant was discretionary;

- under the prevailing office procedures, the appellant was not personally liable for loss to the Organization of the contested amount;

- demotion of the appellant to a post of lesser responsibility at a lower grade level was not justified in the circumstances.

57. Accordingly, the Panel recommends that all materials relating to the allegations of unauthorized lending of official funds by the appellant and of being rude and arrogant be expunged from her files.

58. The Panel further recommends that the appellant be reimbursed the contested amount withheld from her salary.

59. The Panel also recommends that the decision to demote the appellant to a post of lesser responsibility at a lower grade be rescinded."

On 23 January 1990, the Acting Under-Secretary-General for Administration and Management advised the Applicant as follows:

"The Secretary-General has re-examined your case in the light of the Board's report and recalled that you were given the fiduciary responsibilities of Finance Assistant to ensure the protection of funds entrusted to you and that you were personally accountable for any loss. The Secretary-General noted that on two occasions you were not able to account for the loss of monies you had received, and, moreover, copies of temporary receipts issued by you were missing and no entries were made in the cash books. The Secretary-General concluded

that the financial loss suffered by the United Nations was a result of your not properly exercising the fiduciary responsibilities entrusted to you. The Secretary-General has therefore decided to maintain the contested decisions of the Administrator of UNDP:

(a) to demote you from level 5 to 4, effective 15 September 1988, as a disciplinary measure under staff rule 110.3(b);

(b) to reassign you to duties outside the Finance Section;

(c) to recover from you maloti 465 under staff rule 112.3.

The Administrative Tribunal consistently held in this connection that in exercising his disciplinary authority, the Secretary-General possesses wide discretion as regards both the evaluation of the facts and the disciplinary measure to be imposed.

..."

On 12 July 1990, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Staff of the local office did not adhere strictly to UNDP financial rules and procedures. The Resident Representative's disciplinary decision was therefore discriminatory vis-à-vis the Applicant.

2. The investigation at the local office was not conducted in accordance with the procedures prescribed in Section 20902 of the UNDP Personnel Manual.

3. Additional allegations were made against the Applicant of which she had no knowledge and which she did not have the opportunity to rebut, in contravention of administrative instruction ST/AI/292.

Whereas the Respondent's principal contentions are:

1. Staff assigned the responsibility of receipt and custody of official funds are accountable for those funds and are subject to disciplinary action for losses caused by failure to properly deal with such funds.

2. Any delay that occurred in this case was due to the need to investigate the acts of the Applicant in not dealing properly with official funds. Payment of compensation to the Applicant for delays in such investigation would be inappropriate.

The Tribunal, having deliberated from 11 to 18 June 1992, now pronounces the following judgement:

I. The Applicant appeals from the decision of the Secretary-General to demote her from the G-5, step IX level to the G-4, step I level, effective 15 September 1988, and to recover certain monies from her, as disciplinary measures under staff rules 110.3(b), and 112.3. The Secretary-General has not accepted the Joint Appeals Board's recommendation that this decision should be rescinded.

II. Provided that an administrative decision is not tainted by prejudice, bias or other extraneous factors, the Tribunal's jurisprudence in disciplinary cases was stated in Judgement No. 300, Sheye (1982), para. IX, in the following terms:

> "... the reports of the Joint Appeals Board are advisory and ... the Respondent is entitled to reach different conclusions from those of that body on a consideration of all the facts and circumstances of the case.
>
> The Tribunal notes further that it has in its jurisprudence consistently recognized the Secretary-General's authority to take decisions in disciplinary matters, and established its own competence to review such decisions only in certain exceptional conditions, e.g. in case of failure to accord due process to the affected staff member before reaching a decision."

III. The concept of due process, in disciplinary matters, includes compliance with important procedural rules established for the protection of staff members.

IV. Section 20902 of the UNDP Personnel Manual, sets out at length the procedures to be followed in disciplinary cases involving locally recruited staff, when misconduct is attributed to a staff member. In particular, the

staff member must be informed in writing of the allegation of misconduct which caused the investigation. He must then be advised of his right to counsel, be interviewed in person, his statements must be taken down in writing and signed by him, and he has to be given a copy of the statement.

V. The Tribunal finds that the Applicant's case was considered by the Respondent without all these requirements having been fully complied with. For example, the Applicant was not informed of her right to counsel. The Applicant was simply made aware that financial discrepancies arising out of the performance of her duties were being investigated, but that alone did not, in the view of the Tribunal, fulfil UNDP's procedural rules. The failure to comply with Section 20902 of the UNDP Personnel Manual is sufficient to vitiate the Secretary-General's consequential decision to impose a disciplinary penalty.

VI. The Tribunal has come across a confidential note dated 24 August 1987, containing comments adverse to the Applicant that was placed on the file by her superior officer and forwarded by the Resident Representative to the Director of Personnel at Headquarters. This was done without showing the note to the Applicant and was in clear violation of administrative instruction ST/AI/292. The confidential note contained new allegations against the Applicant. As she had not been confronted with them she had no opportunity to defend herself against them. Along with a charge that she was "rude and arrogant", the note stated that the Resident Representative understood from other staff that "she was offering personal loans from the cash box to those who wanted" which made her popular amongst junior staff. This irregularity was made worse by the fact that these allegations were before the Disciplinary Committee when it made its recommendations which were adverse to her. The Tribunal observes that this failure to adhere to the provisions of administrative instruction ST/AI/292 was highly prejudicial to the Applicant, bearing in mind that the Applicant had worked in the UNDP Office in Maseru for some 12 years since May 1975, with duties including the handling of cash, without any accusations of misconduct having been made against her.

VII. For the reasons given above, the demotion of the Applicant cannot be upheld and must be regarded as having been void ab initio.

VIII. The Applicant also seeks rescission of the Secretary-General's decision to recover maloti 465 (about US$170) from her under staff rule 112.3. The loss of that amount was allegedly the consequence of the Applicant's failure to comply with the applicable financial rules of UNDP, and therefore recoverable by the Respondent. However, since this aspect of the Secretary-General's decision also was a result of the flawed disciplinary process, it too must be regarded as having been void ab initio.

IX. The Applicant's pleas do not request review by the Tribunal or any relief with respect to the Secretary-General's decision to transfer her to duties outside the Finance Section of UNDP in Maseru. Accordingly, the Tribunal has no occasion to consider that aspect of the decision.

X. The Applicant's plea for relief because of delay in the disposal of her case is not, in the Tribunal's opinion, justified by the facts; the need for substantial investigation which required time stemmed from legitimate questions concerning the Applicant's discharge of her duties. Besides, during the period of her suspension, the Applicant was being paid her salary. In view of the Tribunal's disposition of the application as stated in paragraphs V to VI, it is unnecessary for it to consider any other grounds urged by the Applicant.

XI. Accordingly, the Tribunal orders that:

1. The decision to demote the Applicant with effect from 15 September 1988 be rescinded.

2. The Applicant should be paid the resulting adjustment in salary, with effect from that date, without interest.

3. The decision to recover maloti 465 from the Applicant be rescinded.

4. The Applicant should be paid an amount of maloti 465 without interest.

5. In accordance with article 9, paragraph 1 of the Tribunal's Statute, the compensation to be paid to the Applicant should be eighteen months net base salary at the G-5, step IX level at the rate in effect on the date of this judgement, if the Secretary-General decides within 30 days of the notification of this judgement that, in the interest of the United Nations, the Applicant should be compensated without further action being taken.

6. All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
President

Samar SEN
Member

Hubert THIERRY
Member

Geneva, 18 June 1992

R. Maria VICIEN-MILBURN
Executive Secretary